

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

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JOSEPH P. MCCARRON,	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
BRITISH TELECOM d/b/a YELLOW BOOK USA;	:	
YELLOW BOOK USA a/k/a BRITISH TELECOM;	:	
SCOTT RUBEL; JIM MCCUSKER; VICTORIA	:	No. 00-CV-6123
SCHARRARR; JOSEPH A. WALSH; ANNE	:	
SNYDER REP STOCK AND LINDA FLYNN,	:	
Defendants.	:	
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MEMORANDUM

GREEN, S.J.

June , 2001

Presently before the court is Defendants British Telecommunications, PLC¹ and Joseph A. Walsh's Motion to Dismiss the Complaint, or, in the alternative, Motion for Summary Judgment, Plaintiff's Response and Defendants' Reply. For the reasons set forth below, Defendants' motion will be denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Joseph P. McCarron, alleges that he was employed by "Yellow Book, USA" as an Account Executive from June 24, 1996 until July 26, 1999, when he was discharged. (See Compl. at ¶¶ 16, 22.) Plaintiff alleges that he requested a leave of absence to obtain treatment for a disability, which he describes as "morbid obesity and bipolar disorder." (See Compl at ¶ 22.) While he was on leave, Plaintiff alleges that he was terminated. (See Compl at ¶ 24.)

¹Defendant British Telecommunications, PLC alleges that it was incorrectly named in the Complaint as "British Telecom, d/b/a Yellow Book USA."

Plaintiff filed a five (5) count complaint on or about December 4, 2000 bringing claims against Defendants for violations the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (“ADA”), the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq. (“FMLA”) and the Pennsylvania Human Relations Act, 43 Pa.C.S.A. § 959 et seq. (“PHRA”). The Summons and Complaint were originally served to all defendants at Yellow Book USA’s office at 2560 Renaissance Boulevard, King of Prussia, Pennsylvania. On February 8, 2001, Defendants British Telecommunications, PLC (“British Telecom”) and Joseph A. Walsh (“Walsh”) (collectively “Defendants”) filed a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(5) and 12(b)(6), or, in the alternative, a motion for summary judgment pursuant to Fed.R.Civ.P. 56(c). Plaintiff responded to Defendants’ motion and subsequently served, via certified mail, the Summons and Complaint on Defendants at Yellow Book USA’s office at 100 N. Centre Avenue, Rockville Centre, New York and British Telecom’s office at 81 Newgate Street, London, England. (See Pl.’s Ex. 1.) Upon receipt of service in New York, Defendant Walsh withdrew his 12(b)(5) motion. (See Def.s’ Reply at 5.) Defendants maintained all other motions.

II. DISCUSSION

A. Insufficiency of Service of Process

Fed.R.Civ.P. 12(b)(5) provides that a party may move to dismiss a complaint for insufficiency of service of process. Service of process is governed by Fed.R.Civ.P. 4. Under Fed.R.Civ.P. 4(h), service upon a corporation is effected:

(1) in a judicial district of the United States in the manner described in subdivision (3)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process . . .

(2) in a place not within any judicial district of the United States prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph 2(c)(1) thereof.

Subdivision (f) states that service in a foreign country may be effected by “any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents.” Fed.R.Civ.P.

4(f)(1). Accordingly, service abroad on a foreign corporation is governed by the terms of the Hague Convention. See Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 696-700 (1988); DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 287 (3d Cir.), cert. denied, 454 U.S. 1085 (1981). Under the Hague Convention, Article 10 permits service of process by mail on foreign corporations provided that the “State of destination” has not filed an objection to that method of service. See Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, Art. 10(a) (hereinafter Hague Convention). The United Kingdom has not objected to service of process by mail. See U.S.C.S. International Agreements at 301 (Law. Co-op 1995); EOI Corp v. Medical Marketing Ltd., 172 F.R.D. 133, 138 (D.N.J. 1997); see also United States Department of State, Judicial Assistance in the United Kingdom (England, Scotland, Wales and Northern Island) (visited May 30, 2001) http://travel.state.gov/uk_legal.html (“The U.K. has not declared that it objects to Article 10(a) of the Hague Service Convention. Therefore, service by international registered mail is permitted.”).

In the present matter, Defendant British Telecom moves to dismiss the Complaint on the ground that service of process was defective and thus, personal jurisdiction over Defendant British Telecom is lacking. Defendant British Telecom alleges that it is a

corporation organized under the laws of the United Kingdom, with a principal place of business in London, England. Therefore, service to Defendant Yellow Book USA's offices in Pennsylvania and New York were allegedly ineffective upon Defendant British Telecom.² Furthermore, Defendant British Telecom argues that service to its office in London, England was ineffective, because the documents were "mailed" in violation of the Hague Convention Articles.

Plaintiff avers that service in Pennsylvania and New York were effective upon Defendant British Telecom, because Yellow Book USA is a wholly owned subsidiary of British Telecom and may reasonably be inferred to be the authorized agent of Defendant British Telecom. (See Pl.'s Ex. 2.) Plaintiff further argues that service in London, England constituted proper service.

Upon reviewing the instant motion and the responses thereto, I find that Plaintiff effected valid service of the Summons and Complaint on Defendant British Telecom by mailing the documents via certified mail to British Telecom's business address in London, England. Contrary to Defendant British Telecom's assertion, service by mail is not barred under the Hague Convention.³ Instead, service by mail is precluded only where the signatories to the Hague Convention have objected to mail service under Article 10. See Hague Convention, Art. 10(a); Deptula v. Derr Flooring Co., No. CIV.A.90-3857, 1990 WL 96635, at *3 (E.D. Pa. July 6,

²Although Defendant British Telecom is a parent company of Defendant Yellow Book USA, Defendant British Telecom contends that Defendant Yellow Book USA is a separately operated entity.

³The case relied on by Defendant British Telecom is inapposite to this matter. See Raffa v. Nissan Motor Co. LTD., 141 F.R.D. 45 (E.D. Pa. 1991). In Raffa, the court held that service by mail was not sufficient under the Hague Convention, in part, because, Japan's internal law does not allow service of process by mail. See id. at 46.

1990). As stated earlier, the United Kingdom does not object to mail service under Article 10. See U.S.C.S. International Agreements at 301. Accordingly, Plaintiff effected valid service of process on Defendant British Telecom, and Defendant British Telecom's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(5) will be dismissed.

B. Failure to State a Claim

Pursuant to Fed.R.Civ.P. 12(b)(6), a party may move to dismiss a complaint for failure to state a claim upon which relief can be granted. When considering such a motion, the district court must "accept as true the facts alleged in the complaint and all reasonable inferences that can be drawn from them." Markowitz v. Northeast Land Co., 906 F.2d 100, 103 (3d Cir. 1990) (citation omitted). Generally, in federal civil cases, a claimant does not have to set out in detail the facts upon which a claim is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim. See Fed.R.Civ.P. 8; Remick v. Manfredy, 238 F.3d 248, 264 (3d Cir. 2001). Dismissal of a complaint is proper only where "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hison v. King & Spalding, 467 U.S. 69, 73 (1984). A motion to dismiss under Fed.R.Civ.P. 12(b)(6) shall be treated as one for summary judgment under Fed.R.Civ.P. 56, if "matters outside the pleadings are presented to and not excluded by the court" Fed.R.Civ.P. 12(b). "A court may not dispose of a matter on the merits without giving the opposing party a reasonable opportunity to present to the court material relevant to the dispositive issue." Brobst v. Columbus Services Int'l, 761 F.2d 148, 154 (3d Cir. 1984).

Defendants move to dismiss Plaintiff's Complaint for failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6). However, Defendants request that the court treat their motion

as one for summary judgment under Fed.R.Civ.P. 56, because their motion is supported by Defendant Walsh's declaration. (See Def.s' Ex. A.) Defendants argue that they are entitled to summary judgment, because (1) Defendant British Telecom was not Plaintiff's employer for purposes of the ADA, PHRA or FMLA; and (2) Defendant Walsh cannot be personally liable under the FMLA or PHRA, because he is neither an employer of Plaintiff or had knowledge or involvement in the allegations complained of by Plaintiff.

Plaintiff opposes Defendants motion on both grounds. Plaintiff argues that Defendants' motion should be denied under Fed.R.Civ.P. 12(b)(6), because the Complaint alleges sufficient facts to state claims against Defendants under the ADA, FMLA and PHRA. In the event that the court treats Defendants' motion as one under Fed.R.Civ.P. 56, Plaintiff argues that the motion should be denied, because he is entitled to minimal discovery to investigate the allegations made by Walsh.

Under the liberal notice pleading requirements in federal court, Plaintiff has asserted sufficient facts to withstand dismissal of the Complaint under Fed.R.Civ.P. 12(b)(6).⁴ The allegations in the Complaint, viewed in a light most favorable to Plaintiff, provide sufficient basis to support claims against Defendants for violations of the ADA, FMLA and PHRA. Therefore, pursuant to Fed.R.Civ.P. 12(b)(6), Defendants' "Motion to Dismiss/Summary Judgment" will be denied.

An appropriate Order follows.

⁴Because Plaintiff has not had an opportunity to conduct discovery regarding the allegations made by Walsh, materials outside the pleadings were not considered for the instant motion. Instead, the motion was evaluated pursuant to Fed.R.Civ.P. 12(b)(6).

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Defendants.	:	
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ORDER

AND NOW, this day of June, 2001, upon consideration of Defendants British Telecommunications, PLC⁵ and Joseph A. Walsh's Motion to Dismiss pursuant to Fed.R.Civ.P. 12(b)(5) and 12(b)(6), or, in the alternative, Motion for Summary Judgment, Plaintiff's Response, and Defendants' Reply, **IT IS HEREBY ORDERED** that Defendants motion is **DENIED WITHOUT PREJUDICE** to Defendants filing a motion for summary judgment after reasonable time for discovery.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.

⁵Defendant British Telecommunications, PLC alleges that it was incorrectly named in the Complaint as "British Telecom, d/b/a Yellow Book USA."